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No. 710

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

THE CELOTEX CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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PETITIONER'S REPLY BRIEF.

An employer declining to produce financial information upon request violates § 8(a)(5) of the National Labor Relations Act only if the facts sought are relevant in the bargaining context. If they are not relevant, there is no violation. In its Brief in Opposition, the Board materially distorts the bargaining context by its failure to mention the controlling and undisputed fact that Petitioner was offering a general wage increase and more costly benefits (Pet. 4); moreover, the Board virtually concedes the irrelevancy of the requested data.

THE BOARD'S CONCESSION.

During negotiations, the Union's requests related to the "gross profits picture" at the Marrero plant (Board's Brief, pp. 6-7). The Trial Examiner understood that the Union was asking for gross profits and nothing more. In his Intermediate Report, he stated that while Marrero's gross-profit figure would not have been as meaningful to the Union as a net-profit figure, "it does not follow that the gross profit figure would have been meaningless" (R. 65). The Board adopted the Trial Examiner's view on this subject (R. 120).

The Court of Appeals' opinion holds in part:

> We therefore hold that the Board properly found that Celotex violated Section 8(a)(5) and (1) of the Act by refusing to disclose to the Union certain of its financial records, including the "gross profits" of the plant, and by unilaterally changing the existing grievance procedure. (Pet. 19)

The Court, the Board and the Trial Examiner all understood that the figures in issue were the gross profits of the Marrero plant. Now, in its Brief in Opposition, the Board virtually concedes that gross-profit figures were meaningless, and therefore irrelevant. At page 11 of its Brief, the Board says:

> Petitioner admittedly possessed gross-profits data for the Marrero plant (see n. 3, *supra*), and the Union could have obtained further enlightenment on the issue of petitioner's ability to continue under the prior contractual restrictions *by deducting Marrero's portion of the company-wide overhead from its gross profits* (R. 65). (Emphasis added.)

The Board's implied concession that gross figures are irrelevant derives from its suggestion that the Union negotiators could deduct "Marrero's portion of the company-wide overhead from the plant's gross profits." The negotiators certainly were not equipped to decide for themselves what Marrero's portion of the overhead should be. Before they could have carried out what the Board now suggests, they would have needed a formula for allocating the overhead burden to 8 plants according to appropriate accounting principles. No formula existed; the Court below found: "No proration by plant of corporate overhead items was in existence" (Pet. 18).

The Board's new position adds a dimension not present in the case before. It highlights Petitioner's contention that the gross figures were devoid of meaning and, in fact, would only have confused the negotiators. If the information demanded is meaningless, it is likewise irrelevant. Without a showing of relevance, an employer's refusal is not a violation of § 8(a)(5) of the Act.

CONCLUSION.

Records must be produced only if relevant. Information relating to wages is presumptively relevant; if the records requested do not relate to wages, the Union must demonstrate the relevance of the data it desires. In the present case, the Fifth Circuit misapplied these principles and created a new rule for profit data that puts the burden of showing irrelevance on the employer. In this, the Court is in conflict with the other four Circuits, as noted at pages 6-10 of the Petition.

It is respectfully urged that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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